Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

77-542

IN THE

Supreme Court of The United States

No. A-225

JAMES D. FURRATE,

Petitioner

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY M. ROSENBLUM
1455 West Loop South
Suite 112
Houston, Texas 77027
(713) 941-2847

LEON S. HIRSCH
1455 West Loop South
Suite 112
Houston, Texas 77027
(713) 626-5517

Attorney for Petitioner

Bowne of Houston

Printed in USA

In The

Supreme Court of The United States

No. A-225

James D. Furrate,

Petitioner

v.

United States

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, JAMES D. FURRATE, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 31, 1977.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript of that court, including the judge's questions to Petitioner in accepting his plea of guilty and Petitioner's statements at sentencing and at the post-sentencing hearing on the issue of voluntariness of Petitioner's plea of guilty are reproduced in Appendix A to this petition.

No opinion was rendered by the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1977. A timely petition for rehearing was filed on April 19, 1977 and was denied on August 8, 1977. On September 9, 1977, Mr. Justice Powell extended the time for filing petition for writ of certiorari to and including October 7, 1977. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 11(c) of the Federal Rules of Criminal Procedure will allow the acceptance of Petitioner's plea of guilty to 26 U.S.C. § 7203 without inquiry as to whether Petitioner possessed the mental element for that offense.

2. Whether Rule 11(f) of the Federal Rules of Criminal Procedure will allow the entering of judgment on Petitioner's plea of guilty to 26 U.S.C. § 7203 without inquiry

as to whether Petitioner possessed the mental element for that offense.

3. Whether Petitioner's plea of guilty was accepted in violation of Rule 11(d) of the Federal Rules of Criminal Procedure according to the standard for attorney competence laid down by this court in *McMann* v. *Richardson*, 90 S.Ct. 1441 (1970).

4. Whether the Court of Appeals for the Fifth Circuit violated its duty to Petitioner by failing to raise the issue of the trial court's compliance with Rule 11 on its own motion where the violation was plain on its face as permitted by the plain error rule, Rule 52(b) of the Federal Rules of Criminal Procedure.

STATUTORY AND RULES PROVISIONS OF LAW

Federal Rules of Criminal Procedure

RULE 11(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

RULE 11(d) INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo conten-

dere results from prior discussions between the attorney for the government and the defendant or his attorney.

RULE 11(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

RULE 52(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Statutes

26 U.S.C § 7201. ATTEMPT TO EVADE OR DEFEAT TAX. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX. Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioner and his wife, BARBARA K. FURRATE, were indicted for failure to file income tax returns and for filing false and fraudulent income tax returns. At the arraignment Petitioner, on the advice of his court-appointed attorney, pleaded guilty to the misdemeanor counts and in return the government dismissed the felony counts. After a short series of questions the district judge accepted Petitioner's plea. Appendix A at pages A2-A7. At the sentencing hearing but before the actual passage of sentence the judge questioned Petitioner concerning information in mitigation of his sentence; Petitioner, however, responded with information elaborating on his understanding of the nature of the charge and the factual basis for his plea. The judge passed sentence. Appendix A at pages A9-A16.

Subsequent to the passing of sentence the court, on its own motion, convened a hearing to determine the voluntariness of Petitioner's plea and to also complete the record for appeal. At this hearing the court-appointed attorney withdrew and was replaced by retained counsel who introduced testimony showing the incompetent representation by the court-appointed attorney.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit which denies Petitioner the opportunity to replead violates the purpose and spirit of Rule 11 of the Rules of Criminal Procedure, defies the decisions of this Court interpreting Rule 11, and ignores this Court's holdings which define the substantive law for 26 U.S.C. § 7203. First, Rule 11(c) admonishes trial judges not to accept pleas of guilty until they are certain defendants understand the nature of the charge against them. *McCarthy* v. *United States,* 89 S.Ct. 1166 (1969), under-

scored this requirement by insisting that this understanding be woven into "the record at the time the plea is entered." *McCarthy, supra,* at 1173. In *McCarthy, supra,* as in Petitioner's case, the district court failed to inquire whether the defendant understood the nature of the charge and this court held that this failure compelled reversal. Second, Rule 11(f) forbids the trial judge to enter judgment upon a plea without making sure that a factual basis exists for the plea. *Santobello* v. *New York,* 92 S.Ct. 495 (1971), makes clear that this factual basis must also be woven into the record (*Santobello, supra,* at 498). That the trial judge's failure to abide by these Rule 11 provisions worked a substantial injustice to Petitioner is shown by the substantive law of 26 U.S.C. §§ 7201 and 7203. In *Spies* v. *U.S.,* 63 S.Ct. 364 (1943), this Court, in noting that the word "willful" forms an integral part of the statutory offense, stated about § 145a of the Revenue Act of 1936, the predecessor to 26 U.S.C. § 7203:

> "Had § 145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns . . ."
>
> *Spies, supra,* at 368.

In *Sansone* v. *United States,* 85 S.Ct. 1004 (1965), this Court stated that the misdeameanor "requires only willfulness and the omission of the required act — here the payment of the tax when due." *Sansone, supra,* at 1010. Both decisions recognize that "willfulness" forms a vital part of the offense. The trial judge did not inquire into this vital element of the offense; under *McCarthy, supra,* and *Santobello, supra,* this alone should invalidate the plea. Petitioner's own statements at the sentencing hearing and at the voluntariness hearing fortify this result. Petitioner stated at the sentencing hearing:

> "I didn't know I could file them without sending the money . . ."
>
> Appendix A at page A9.

Petitioner stated at the voluntariness hearing:

> "I thought that it was a misdemeanor filing a late tax return . . ."
>
> ". . . I told him [the district attorney] I really didn't want to fight the government on those charges because I felt that I was guilty of filing my return late, but I had a good reason for doing it."
>
> Appendix A at B14-B15.

These Rule violations take on added zest when considered in conjunction with the allegations of incompetent counsel. Basic to the defense of tax violation charges lies the notion of willfulness. Yet court-appointed counsel believed that Petitioner's only defense was that of "insanity." Appendix A at B52. Petitioner's statement in open court that "I didn't know I could file them without sending in the money . . .", Appendix A at A9, should have easily alerted the court-appointed attorney to the defense of Petitioner's lack of willfulness. Yet, at the time of the subsequent voluntariness hearing the attorney still had not recognized the existence of this defense. In *United States* v. *Easter,* 539 F.2d 663 (1976), the 8th Circuit, relying on *McMann* v. *Richardson, supra,* reversed a conviction for counsel's failure to move to suppress illegally gained evidence by a blatantly unlawful search and seizure. Certainly failure to even advise a client of the element of willfulness constitutes as great a dereliction of duty.

Some concern arises whether the failure to raise the Rule 11 violations in the district court means that these points are not preserved for appeal. The Fifth Circuit has stated in dicta in *United States* v. *Cooper,* 410 F.2d 1128 (5th Cir. 1969), that Rule 11 violations must be raised in the trial court before they can be considered on appeal. This

conflicts sharply with decisions rendered by other circuits. In *Majko* v. *United States*, 457 F.2d 790 (7th Cir. 1972), the Court of Appeals for the Seventh Circuit stated that "it is our duty to review the record for compliance with Rule 11, although Petitioner did not specifically raise the *McCarthy* issue . . ." *Majko, supra,* at 791. Two opinions for the Eighth Circuit agree. *United States* v. *Bradin*, 535 F.2d 1039 (8th Cir. 1976), and *United States* v. *Untiedt*, 479 F.2d 1265 (8th Cir. 1973). The extreme importance of Rule 11 merits a full determination of these questions and urges that these questions — apparent on the face of the record — be considered without presentation to the trial court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON S. HIRSCH
1455 West Loop South, Suite 112
Houston, Texas 77027
(713) 626-5517

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit was served upon the Solicitor General, Room 5614, Department of Justice, Washington, D.C. 20530, by United States Certified Mail, return receipt requested, postage prepaid on this day of October, 1977.

LEON S. HIRSCH

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UNITED STATES

APPENDIX A
TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-3084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES D. FURRATE,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas

---

(March 31, 1977)

BEFORE BROWN, Chief Judge, and RONEY and HILL, Circuit Judges.

PER CURIAM: AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-3084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES D. FURRATE,

Defendant-Appellant

(August 8, 1977)

PER CURIAM: Petition for Rehearing and Petition for Rehearing En Banc is DENIED.

PROCEEDINGS

MR. KOCH: Your Honor, the next case on the docket is US versus James D. Furrate. And he is represented by Mr. Holley.

Your Honor, the Government might advise the Court it's our intention only to arraign Mr. Furrate on Counts No. 1, 2, 3 and 4. It's our intention to dismiss Counts 9, 10, 11 and 12 if he persists in a guilty plea upon completion of sentencing.

THE COURT: 1, 2 and 3?

MR. KOCH: No, we will arraign him on 1, 2, 3 and 4.

THE COURT: All right.

MR. KOCH: And dismiss the remaining counts.

THE COURT: All right.

MR. KOCH: In United States of American versus James D. Furrate, Criminal No. 3-76-113, the Grand Jury charges:

(Count No. 1 was read by Mr. Koch as filed.)

THE COURT: Mr. Koch, I think that you can summarize the other three if its satisfactory with Mr. Furrate.

May he summarize it?

MR. FURRATE: Yes, that's fine.

THE COURT: You have read it yourself, haven't you?

MR. FURRATE: Yes, Your Honor.

THE COURT: All right.

(Counts 2, 3 and 4 were summarized by Mr. Koch.)

MR. KOCH: Mr. Furrate, I would advise you that on each one of these counts the maximum penalty that the Court can impose is a $10,000.00 fine or one year incarceration in the Federal Correctional Institution or both, plus the costs of the prosecution for each count, should you be found guilty. That would make a maximum penalty that the Court could impose of a $40,000.00 fine or four years incarceration in a Federal Correctional Institution or both, plus the costs of the prosecution.

I would further advise you that you have a constitutional right to a jury trial. You can either enter a plea of guilty or not guilty this morning. If you enter a plea of guilty you would automatically be assigned a jury trial unless you and your trial counsel waived that right in writing.

Can you tell us what your age is, please?

MR. FURRATE: 37.

MR. KOCH: All right. Do you understand what you're charged with in each of the four counts?

MR. FURRATE: Yes, sir.

MR. KOCH: Do you understand the maximum penalty that the Court could impose?

MR. FURRATE: Yes, sir.

MR. KOCH: And do you understand you do have a constitutional right to a jury trial?

MR. FURRATE: Yes, sir.

MR. KOCH: All right. Thank you.

JAMES D. FURRATE,

BY THE COURT:

Q Mr. Furrate, did you hear the U.S. Attorney read Count 1 of the Indictment?

A Yes, Your Honor.

Q And did you hear him summarize Counts 2, 3 and 4 of the Indictment?

A Yes, Your Honor.

Q Did you understand them?

A Yes, Your Honor.

Q Have you had the advice of counsel?

A Yes, I have.

Q Do you understand the maximum penalty?

A I do.

Q And do you understand your right to a jury trial?

A Yes, I do.

Q Well, understanding the charge, understanding your rights and the maximum penalty, do you wish to plead guilty or not guilty?

A I wish to plead guilty, Your Honor.

Q Do you make that plea freely and voluntarily?

A I do.

Q Has anyone talked you into pleading guilty against your own belief about it?

A No.

Q Do you make that plea simply because you know yourself to be guilty?

A Yes, Your Honor.

Q Now, the U.S. Attorney announces that Counts 9, 10, 11 and 12 will be dismissed when you are sentenced if you continue to plead guilty. Has he made any other promises to you?

A No, Your Honor.

Q And do you understand that he has agreed to do that?

A Yes, I do understand.

THE COURT: Hold up your right hand.

(The Defendant Mr. Furrate was duly sworn by the Court.)

Q (By The Court) During the year 1969 did you have a gross income of $13,039.00?

A Yes, Your Honor.

Q Did you know that you were required by law to file an income tax return?

A Yes, Your Honor.

Q Did you fail to file an income tax return on or before April the 15th, 1970?

A Yes, Your Honor.

Q Did you know that you were supposed to?

A Yes, I did know that.

Q On Count 2 did you know that you — during the year 1970 did you have a gross income of $15,766.00?

A Yes, Your Honor.

Q And did you know that you were required to file an income tax return before April the 15th, 1971?

A Yes, Your Honor.

Q And did you fail to do so?

A I did.

Q And during the year 1971 did you have an income of $16,569.00?

A Yes, Your Honor.

Q And did you fail to file an income tax return before April the 17th, 1972?

A Yes, Your Honor.

Q And during the year 1972 did you have a gross income of $18,175.00?

A Yes, Your Honor.

Q And did you fail to file a return prior to April the 16th, 1973?

A Yes, Your Honor.

Q And did you know that you were required to file such an income tax return for the years just mentioned?

A Yes, Your Honor.

THE COURT: I find you guilty on your plea of guilty and on your admission of the facts. I will ask you to see one of the probation officers over here before you leave. You will be sentenced on July the 9th at 2:00 o'clock.

MR. KOCH: Your Honor, we would also ask that Mr. Furrate stop by the marshal's office up on the 16th floor so they can process him through there.

THE COURT: All right.

(End of proceedings.)

PROCEEDINGS

MR. ETHINGTON: The next case on the docket, Your Honor, is United States of America versus James D. Furrate, and his lawyer is Grady Lamar Holley.

THE COURT: Do you have anybody here to speak for you?

MR. FURRATE: No, Your Honor.

MR. HOLLEY: Your Honor, may I add that he is estranged from his wife.

THE COURT: I know that.

MR. HOLLEY: And that's — —

THE COURT: I am familiar with that situation. I have her on next.

JAMES D. FURRATE,

BY THE COURT:

Q What would you like to say for yourself?

A One of the reasons I think, as stated in the Internal Revenue report, for failure to file on time was that I did not know that you could file the return without sending in the money, which was one of the primary reasons that they were filed late. Once I found out you could file when I hadn't, I made preparations to file them and did file them, and as of today all my returns, including my estimated 1976 returns have been filed.

Q You know, the thing that concerns me even more

than your failure to file the income tax returns is that you, when it was called to your attention you filed, that is according to the Indictment, you filed fraudulent returns. Now, you are not being prosecued on those, but the mere idea that you would file fraudulent returns after being warned to file your income tax return is something that concerns me.

A Well, Your Honor, of course I think that's the opinion of the Internal Revenue. I think at the time in which I filed I had been talking not only to Internal Revenue but the Federal Bureau of Investigation for a year and a half in regard to other people's returns and business activities, in regard to Federal housing projects, which in itself preciptated the review of my returns.

And knowing that I was being investigated, I certainly — it would certainly be dumb on my part to file a fradulent return when I know I am being investigated to start with. And during my audit in the presence of Mr. Tom Lynn and Ulysses Borg, the agents for Internal Revenue,

when some things were brought to my attention that I didn't have records on or had forgotten about, I asked if I could amend my returns. They said that it wouldn't be necessary, that they could be contacting me.

And a year and a half went by before an Indictment was brought down. And I asked if I could amend

my returns, and I was told not to do it, that I would be contacted. I cooperated with them not only in regard to my returns, but many other people, not only the Internal Revenue, but FBI. And I don't think I was trying to hide anything from them.

Q Is that all you have to say?

A Well, I think that one of the other reasons which part of the problem was that under pressure of a lot of financial pressures and family pressures from marital situation and the situation with stepchildren that my life was really in utter chaos about 24 hours a day, and this was one of those things that — steadily solving problems on a daily basis family situation. And the taxes weren't filed and weren't handled because I didn't know I could file them without sending in the money. And due to the family situation, I never had the money to pay the taxes. So they were put off hopefully until next week every time hoping that I would have the money to file them. And once I found out I could file them without sending in the money I filed them.

Q Did it ever occur to you to call the Internal Revenue and find out?

A No, it didn't. I had always, you know, before just sent in a check or money order or whatever, and I didn't have the check or money order to send in.

THE COURT: Let's see what your lawyer has to say.

MR. HOLLEY: May it please the Court, when I first met the Defendant, I interviewed him carefully. And he told me that this entire matter came from the very stressing family situation that he was involved in. He assumed a marriage where his wife, whom he claims is an alcoholic, had four children, and he started raising these four stepchildren. In addition to that he has full custody and did then of a 13 year-old daughter who is living with him now in Houston.

I found Mr. Furrate to be above average intelligence. I found him to be under quite a bit of strain as early as June of 1976.

I said to him, "If you are guilty of income tax evasion you better look into that and either try to get a defense or whatever might be appropriate. And he told me then that he had been advised by Mr. Tom Lynn and others in the Internal Revenue Service that he did not need to amend those '69, '70 and '71 returns. And I believed him. I don't want to put him in controversy with Mr. Tom Lynn, who I think is in the Courtroom, but that is what he told me.

Now, in the meantime, he has filed his '74, '73 and '75 returns. He has paid almost $32,000.00 in income

tax in cash, and I understand he has filed his '76 estimated.

He is a war veteran. He has no previous criminal history. I think the Court is well aware that what might be in the probation officer's report in regard to evasion of taxes is pure hearsay. He is not charged.

THE COURT: That's true.

MR. HOLLEY: — with that before the Court. I think he is a good father. The main thing, perhaps I could say in closing, is that the 13 year-old daughter would be here today except she is afraid to fly, and she is extremely, still very, very emotional. One of this man's problems, and I will be through, Your Honor, is that one of his stepsons was before you not long ago for bank larceny.

THE COURT: I put him on probation.

MR. HOLLEY: I don't know what Your Honor did. I didn't go that close. We do urge larceny, and we urge probation. I feel that I know a little bit about human nature, and I think this man can rehabilitate himself and become a useful citizen. Thank you.

JAMES D. FURRATE,

BY THE COURT:

Q Mr. Furrate, I believe you started a new business in Houston, is that right?

A Yes, Your Honor, I am self-employed.

Q What is it exactly?

A I do — I prepare contract documents for architects. I do their working drawings on a contract basis, work that they can't handle in their office. One or two man offices that can't afford to put on a staff to hire a short-term project, I do it on a contract basis for them.

Q Is there anything else you would like to say? Let me ask you, what provision will you make for your daughter if I place you in an institution?

A Well, I have a problem. When I did separate from my wife in Dallas I asked my daughter if she would like to live with her mother. She talked to her mother in California. She didn't want to live with her mother. Her mother is — she is a registered nurse, is attending UCLA law school, and just really is too busy to be a mother. And my daughter doesn't want to live with her.

I really don't know. My parents, my father is 75 and my mother is 76. I have one sister who lives in Massachusetts. I really don't know what I would do. I've had custody of my daughter since she was one year old when I got a divorce from my first wife.

THE COURT: Well, I will give you a little bit of time to see if you can't place her, make some sort

of provision. But I do sentence you to six months in the custody of the Attorney General on Count 1, and I sentence you to six months on Count 2 to run concurrent with Count 1.

On Count 3, imposition of sentence is suspended, and you are placed on probation for three years. On Count 4 the imposition of sentence is suspended, and you are placed on probation for three years to run concurrent with the sentence in Count 3.

And if I didn't say it, I will say again, I will say it now, that the sentence in Count 3, which is three years probation, is consecutive with the sentence in Counts 1 and 2. And I presume you want to dismiss the other counts?

MR. ETHINGTON: Yes, Your Honor.

THE COURT: Now, you can report to the marshall on Monday, August the 2nd at 10:00 o'clock. Now, that will give you time to make some arrangements with regard to your business and with regard to your daughter.

Is there any question that you wish to ask? I'll ask you to go up to the marshal's office and see if they have any requests to make of you.

MR. FURRATE: Yes, ma'am.

MR. ETHINGTON: Excuse me, Your Honor, I didn't hear whether or not you recommended a particular institution.

THE COURT: No, I didn't.

MR. ETHINGTON: Could I have the record reflect that those are Counts 9, 10, 11 and 12, Your Honor, that we move the Court to dismiss?

THE COURT: Yes.

MR. ETHINGTON: Thank you.

THE COURT: No, I'll let them decide, because he lives in Houston, and there may be some institution down there that they would prefer to designate.

MR. ETHINGTON: Yes, ma'am.

(End of proceedings.)

A. Excuse me, in that conversation I had brought up the question to him about the plea of the not filing charges, and at that time he told me that I wanted to make sure of what I was pleading guilty to. And he told me that not filing a tax return was a felony, and that filing it late was a misdemeanor.

And I said, well, I had talked to a friend of mine that said they didn't agree with that, and I just wanted to make sure. And he told me it was a felony. And so subsequently I have been told by other counsel that filing a late tax return is only a penalty case because it's not a misdemeanor, it's a penalty.

Q. When was this conversation?

A. This was the conversation two days before we came up here for sentencing.

Q. I see. When —

A. I have a tape recording of that conversation, by the way.

Q. When had it been determined that you were going to plead guilty, or when had this conversation —

A. Well, I was under the opinion that what I was pleading guilty to was correct from advice of counsel, and I subsequently — I didn't understand really what I was pleading guilty to. I thought that it was a misdemeanor filing a late tax return, and that's

what — my first meeting with Mr. Koch in his office, I told him I really didn't want to fight the Government on those charges because I felt that I was guilty of filing my return late, but I had a good reason for doing it.

Q. I see. What was — now, getting back to this conversation prior to your plea, what else was said during this conversation? This is the third conversation you had.

A. That's all. It only lasted about two minutes.

Q. I see. Did you talk to him after you were sentenced?

A. Well —

Q. I am sorry, did you talk to him after you had pled guilty?

A. Yes, I talked to him one more time before sentencing, and that was in the back of the Courtroom prior to coming up here to be sentenced.

Q. I see. And what was —

A. He had just come from presentencing hearing, and my comment to him was if there was any possibility at all of me going to jail I will reverse my plea to not guilty. And he said no, he said, "I see no reason why the Judge won't give you probation."

And I said, "Well, if you have got any doubts

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OCTOBER TERM, 1977

JAMES D. FURRATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-542

JAMES D. FURRATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In the United States District Court for the Northern District of Texas, petitioner pleaded guilty to four counts of willful failure to file federal income tax returns for 1969 through 1972, in violation of 26 U.S.C. 7203. Upon petitioner's plea of guilty, the government agreed to the dismissal of four counts of income tax evasion (App. 28).[1] The district court sentenced petitioner to six months' imprisonment and three years' probation (App. 13).

Petitioner thereafter engaged new counsel and moved to withdraw his guilty plea on the ground that it was not voluntary. After a full hearing (App. 45-101), the district court found that petitioner's plea had been made

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[1] "App." refers to the appendix filed in the court of appeals.

voluntarily (App. 101). The court of appeals affirmed the judgment of conviction without opinion and denied petitioner's motion for a stay of the mandate pending certiorari (Motion for Bail Bond 2). By order dated November 16, 1977, Mr. Justice Powell denied petitioner's motion for bail pending certiorari.

At the sentencing hearing, the prosecutor read Count I of the indictment to petitioner and summarized the three other counts, all of which charged him with willful failure to file income tax returns. He then advised petitioner of the maximum penalties that could be imposed and of his right to a jury trial. Petitioner stated that he understood the nature of the charges, that he was aware of the maximum penalties that could be imposed, and that he knew he had a right to a jury trial (Pet. App. A2-A4). Upon further questioning by the district court, petitioner stated that he understood the charges and their maximum penalties; that he had had the advice of counsel; that he knew he had a right to a jury trial; that he wished to plead guilty, freely and voluntarily, to the first four counts; that no one had pressured him and that he was pleading guilty because he knew himself to be guilty; and that the United States Attorney had made no promises except that the felony counts would be dismissed in exchange for the pleas to the misdemeanor counts (Pet. App. A4-A5). Petitioner then admitted that he had had income in the amounts stated in the indictment for each of the four years[2] and that he knew he was required by law to file an income tax for each year but had failed to do so (Pet. App. A6-A7).

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[2]Petitioner admitted gross income of $13,039 for 1969, $15,766 for 1970, $16,569 for 1971, and $18,175 in 1972 (Pet. App. A5-A6).

1. Petitioner contends (Pet. 5-7) that the district court failed to comply with Rule 11(c), Fed. R. Crim. P., because it did not ensure that he understood the nature of the charge against him, particularly as it related to willfulness. But the record established beyond question that petitioner admitted that he knew he was required to file tax returns for the years in question and that he failed to do so (Pet. App. A5-A7). Thus, his failures were willful in the sense that he had committed a "voluntary, intentional violation of a known legal duty." *United States* v. *Pomponio*, 429 U.S. 10; *United States* v. *Bishop*, 412 U.S. 346, 360.

McCarthy v. *United States*, 394 U.S. 459, upon which petitioner relies (Pet. 5-6), is distinguishable. There the district judge did not inquire whether the defendant understood the nature of the charge against him. The Court rejected the government's argument that since the defendant had stated his desire to plead guilty, the district court could properly assume that he understood the charge (see 394 U.S. at 464). Here, however, the record establishes that petitioner understood the nature of the charges against him.[3]

3. Finally, petitioner argues (Pet. 7) that his court-appointed attorney, who represented him at the sentencing hearing, was incompetent. A defendant who pleads guilty on the advice of counsel may have his plea vacated only if he can demonstrate that the attorney's advice was not "within the range of competence demanded of attorneys in criminal cases." *Tollett* v. *Henderson*, 411

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[3]The record likewise refutes petitioner's contention (Pet. 6) that the sentencing judge failed to comply with Fed. R. Crim. P., Rule 11(f), which requires that the court make "such inquiry as shall satisfy it that there is a factual basis for the plea."

U.S. 258, 266; *McMann* v. *Richardson*, 397 U.S. 759, 771. Thus, the defendant must prove "serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." *McMann* v. *Richardson, supra,* 397 U.S. at 774.

There is no such proof here. Petitioner suggests (Pet. 7) that he might have gone to trial and testified that he had not known he could file the returns without paying the tax. But such testimony would not even constitute a denial of the existence of willfulness; it would not establish any colorable defense. There was, therefore, no reason why petitioner's counsel should have advised such a course of action. Accordingly, petitioner has not established even that his counsel was guilty of an error of judgment, let alone that the quality of the representation he received fell below the constitutional minimum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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